

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VALENTINA A ROMBALCH,

No C 04-01701 VRW

Plaintiff,

ORDER

v

JO ANNE B BARNHART, Commissioner
of Social Security

Defendant.

Plaintiff Valentina A Rombalch¹ appeals from a decision of the Social Security Administration (SSA) denying her application for Social Security Income (SSI) benefits under Title XVI of the Social Security Act ("the Act"). The parties have filed cross motions for summary judgment. Pl Mot (Doc # 6); Def Mot (Doc #10). Based upon careful review of the administrative record and the applicable law, the court DENIES plaintiff's motion and GRANTS defendant's motion.

¹ Although the complaint and all other filings in the instant appeal spell plaintiff's last name "Rombalch," nearly all documents in the administrative record spell her name "Rombakh." Where record documents are quoted in this order, the original spelling will be used.

I

A

Plaintiff was born in Russia on June 23, 1948, and was fifty-four years old on November 12, 2002, the date of application for benefits at issue on this appeal. Administrative Record (AR) (Doc #5) at 96 146-55. She completed her education in Russia, including high school and four years of college studying "lathe production technology and glassworks technology," then worked in Russia for twenty-nine years as an instructor at a technical school AR 17, 34-35, 129, 243.

On October 17, 1997, plaintiff was admitted to the United States, together with her husband, as a refugee under section 207 of the Immigration and Nationality Act, 8 USC § 1157, AR 99, apparently because her husband is Jewish. AR 235. According to plaintiff, she has never held employment in any capacity in the United States. AR 39. In her November 13, 2002 SSI application, plaintiff stated that her household in Santa Clara consisted of herself, her husband and her two sons and that the house was owned or in the process of being bought by one of her sons, Oleg Rombakh. AR 100. At the December 2003 hearing, however, plaintiff testified that she lived only with her husband, whom she described as a "very sick person." AR 49-50. In her daily activities questionnaire, plaintiff wrote that on an average day she studied English, cooked, cleaned, read the newspaper and books, walked and rested. AR 123.

Evidence regarding the exertional requirements of plaintiff's job in Russia appears in various places in the administrative record. In plaintiff's December 28, 2002, Work History Report (WHR), she described her teaching job in Russia as a

1 "turner instructor," AR 161, and represented that her job
2 responsibilities included: writing "reports for each lesson,"
3 conducting lessons in which she taught students how to operate
4 "turner machines" and overseeing students as they worked. AR 35-
5 36, 161. She described the job as requiring four hours per day
6 walking, three hours per day standing and one hour per day sitting,
7 frequent lifting of fifteen pounds and occasional lifting of at
8 most twenty pounds. AR 161, 129-30. Her statements in a March 22,
9 2001 WHR filed in connection with her first SSI claim were
10 generally consistent, but noted frequent lifting of ten, not
11 fifteen, pounds. AR 129-30. In later testimony, however,
12 plaintiff described the job as requiring much more exertion;
13 specifically, that it required her to lift almost thirty pounds and
14 to spend the majority of her day on her feet. AR 44.

15 On March 6, 2001, plaintiff applied for SSI benefits
16 contending a disability onset date of January 1, 1979.²
17 Plaintiff's husband applied for SSI benefits at the same time. AR
18 115. AR 103-12. Her application was denied initially and on
19 reconsideration, and she did not request a hearing on the 2001
20 claim. AR 16.

21 On November 13, 2002, plaintiff applied for SSI benefits
22 for a second time, AR 99-102, claiming to be disabled based on
23 various health conditions including "high blood pressure,

24
25 ² The administrative law judge's decision incorrectly stated that
26 plaintiff's first application gave a disability onset date of January
27 1, 1993. AR 16. It is possible that the ALJ confused this
28 application with that submitted on the same date by plaintiff's
husband, Gennadiy Nisunovich Rombakh, that was also included in the
record, apparently by mistake. See AR 93-95. The discrepancy is not
material to any issue before the court on this appeal.

1 arthritis, varicose veins [sic], bleeding uterus; depression" which
2 made her get tired easily, feel weak and suffer from headaches. AR
3 103-12. This time, she alleged an onset date of December 1, 1996.
4 AR 99. Plaintiff's application was again denied initially and on
5 reconsideration. AR 78, 82, 83. Plaintiff requested a hearing
6 before an ALJ, AR 87, and secured appointed counsel to represent
7 her. AR 90. Because the administrative law judge (ALJ) declined
8 to re-open plaintiff's earlier claim, AR 16, and plaintiff did not
9 appeal that aspect of the ALJ's ruling, only the November 2002
10 application is the subject of this appeal. The administrative
11 record, however, contains nearly all the documents and medical
12 records pertaining to both the 2001 and the 2002 applications.

B

15 Apart from the medical reports ordered by the SSA in
16 connection with plaintiff's claim for benefits, discussed below,
17 medical records in the administrative record consist of extensive
18 clinic notes from plaintiff's treating physician at the Santa Clara
19 Valley Medical Center's Refugee Clinic. AR 270-329; 351-85.
20 Noteworthy from these records was an August 23, 2001 visit with Dr
21 Susan Wong in which plaintiff brought up depression: "Never feels
22 suicidal. But once she feels angry enough she wants to bite
23 herself. Pt doesn't want to be referred to mental health. She
24 just wants to try meds." AR 272. Dr Wong prescribed Zoloft, an
25 antidepressant, id, and refilled this prescription at least twice,
26 AR 270, 372. Plaintiff presumably took Zoloft until February 4,
27 2002, when Dr Wong noted "pt felt a lot better. She wants to stop
28 taking zoloft after finish her current Rx." AR 370. On September

1 4, 2002, however, plaintiff asked to restart Zoloft because "she
2 sort of feels 'down' again lately." AR 362. The notes reflect at
3 least two refills of Zoloft after that date. AR 399, 406.

4 Regarding the evaluation of plaintiff's asserted physical
5 impairments, the record contains reports from two agency-ordered
6 comprehensive internal medicine examinations and attendant internal
7 agency medical evaluations by non-examining physicians.

8 On May 31, 2001 plaintiff saw Paul D Levin, MD for a
9 comprehensive internal medicine evaluation. AR 222-25. Dr Levin's
10 report made note of plaintiff's reported medical history, including
11 past chest wall pain, high blood pressure, headaches with eye
12 twitches, arthritis pain in her hands and knees, post-bunionectomy
13 pain in both feet and unexplained pain in her left hip, AR 222. He
14 noted her height to be 63 inches and her weight to be 259 pounds;
15 he described her as "very overweight." AR 223. Dr Levin noted the
16 range of motion in plaintiff's spine and hips to be "normal." AR
17 224. He diagnosed plaintiff with high blood pressure "under fair
18 control," "mild to moderate" osteoarthritis of the hands, mild
19 osteoarthritis of the knees, and "probably degenerative disc
20 disease of her lumbar spine, significant." AR 225. Dr Levin also
21 diagnosed "chronic mild discomfort" in her feet due to previous
22 surgery for bunions. AR 222, 225. Dr Levin suspected plaintiff
23 had active disc disease because of the "absence of a left ankle
24 jerk" and radiating pain down her leg. AR 225. He concluded that
25 she could lift ten pounds easily, twenty pounds occasionally, walk
26 for a total of thirty minutes in an eight-hour day, sit for eight
27 hours in an eight-hour day, bend, stoop and crouch, and had no
28 limitation in fine or gross touch, reaching, handling, grasping or

1 manipulating; he stated that she should avoid crawling, climbing,
2 balancing or reaching. Id. In his report, he found that she was
3 able to stand for ten to fifteen minutes at a time. Id.

4 Following receipt of Dr Levin's report, agency physician
5 Harmon Michelson, MD reviewed the case records and completed a
6 Physical Residual Functional Capacity Assessment dated July 2,
7 2001. AR 226-32. His primary diagnosis was morbid obesity, with a
8 secondary diagnosis of hypertension. AR 226. He checked boxes
9 showing plaintiff able to lift twenty pounds occasionally and ten
10 pounds frequently, stand/walk six hours per day and sit six hours
11 per day, with unlimited pushing/pulling (upper extremity) capacity.
12 AR 227. He found her stooping, kneeling, crouching, crawling and
13 climbing abilities limited because "claimant is morbidly obese and
14 would not be able to get in and out of these postures except on an
15 occasional basis, slowly, and with considerable exertion." AR 228.
16 He found no manipulative, visual, communicative or environmental
17 limitations. AR 229-30. He found plaintiff's alleged onset date
18 of 1979 "not credible" given her stated work history through 1997
19 and "activities enumerated to psychologist by claimant herself
20 which include up to full days of attendance at school" and
21 expressed skepticism about plaintiff's claim of disability:

22 claimant's credibility is tainted by symptom
23 amplification, at the very least. Note
24 especially, that except for the [consulting
25 examiner], no one spontaneously observes any
26 impairments at all. Note that her gait and
27 ability to get around in various * * * offices is
28 unimpaired. There is no justification for further
x-rays or [work-up] at department's expense,
because no matter what they show, the longitudinal
MEOR and the current function speak for
themselves, and the claimant is not even near
allowance level impairment.

1 AR 231. Dr Michelson's evaluation expressed disagreement with Dr
2 Levin's suggested restrictions, commenting that they "are backed up
3 by neither his own exam nor the longitudinal HX. Just about all
4 the findings are normal." AR 232. These conclusions were reviewed
5 and affirmed by Samuel McFadden, MD. AR 233.

6 On February 20, 2003, in connection with plaintiff's
7 March 2002 application for benefits, Dr Dean Chiang, a board-
8 certified internal medicine specialist, conducted a second physical
9 examination of plaintiff. AR 332-35. He noted her height as 64
10 inches and her weight as 256 pounds and described her as an "alert,
11 oriented, obese white female who was friendly and cooperative." AR
12 333. Regarding plaintiff's "chief complaint" of joint pain, he
13 concluded that she suffered from joint pain that was "likely
14 secondary to osteoarthritis," but found her "freely ambulatory at
15 least with short distances inside the clinic," but stated it would
16 not be surprising to find out "her mobility is somewhat limited for
17 long distances." AR 335.

18 Dr Chiang determined that plaintiff could stand and walk
19 for between four to six hours in an eight-hour day and would be
20 able to lift and carry, as well as push and pull, thirty pounds
21 occasionally and ten to fifteen pounds frequently. Id. Dr Chiang
22 found "no manipulative limitations and no other relevant workplace
23 environmental limitations." Id.

24 Following submission of Dr Chiang's report, agency
25 physician Neyvin Gordon, MD completed a further RFC Assessment on
26 April 1, 2003 that agreed in all significant respects with that
27 completed in July 2001 (AR 226-32). AR 341-48.

28 \\\

1 Plaintiff also underwent three agency-ordered mental
2 health examinations in connection with her applications for SSI
3 benefits; these formed the basis for agency physicians' assessments
4 of her claim.

5 On June 7, 2001, psychiatrist Rafael H Gutierrez, MD
6 examined plaintiff without the help of an interpreter. His report
7 noted "I need to say that this lady spoke very little English and
8 had a hard time communicating with me in which I tried my very best
9 throughout the interview to understand her. * * * [T]his was en
10 extremely difficult case for me since there was not a translator
11 provided * * *. [T]here needs to be a psychiatric evaluation at the
12 county medical clinic with a translator." AR 234-35, 237. With
13 those caveats, he diagnosed plaintiff with dysthymic disorder with
14 adjustment disorder, "depressed mode," and a Global Assessment of
15 Functioning (GAF) of 55. Id at 237. The report mentioned
16 plaintiff's obesity and her tearfulness several times and observed
17 "I feel that this lady is depressed." AR 236. But Dr Gutierrez
18 also found her oriented and cooperative with "good contact with
19 reality." Id at 236.

20 On August 13, 2001, a consultative neuropsychologist,
21 Faith Tobias, PhD, evaluated plaintiff with the assistance of a
22 translator. AR 242-45. Dr Tobias gave a simple Axis I diagnosis
23 of "major depressive disorder" and deferred Axis II and III
24 diagnoses. AR 244. Of eleven work-related abilities listed in her
25 report, Dr Tobias found no impairment in nine of the areas
26 including following simple instructions, following complex/detailed
27 instructions, maintaining pace or persistence to perform both
28 simple and complex tasks, maintaining adequate

1 attention/concentration and adapting to changes in job routine. AR
2 245. Dr Tobias found that plaintiff displayed "marked impairment"
3 in the ability to "[w]ithstand the stress of a routine work day" as
4 well as the ability to "[m]aintain emotional stability [and]
5 predictability." Id. She also noted that "[d]uring today's
6 evaluation the claimant was able to read and write simple sentences
7 in English. However, her spoken English is more limited."

8 On September 15, 2001, agency physician George Norbeck,
9 MD completed a Psychiatric Review Technique form indicating that
10 plaintiff suffered from affective disorders that were "severe," but
11 "not expected to last twelve months." AR 251. The review
12 indicated no restriction in activities of daily living, social
13 functioning or maintaining concentration, persistence or pace, and
14 indicated "insufficient evidence" regarding repeated episodes of
15 decompensation. AR 261. On September 15, 2001, agency physician
16 Craig A Smith MD affirmed these findings. AR 251. Dr Norbeck also
17 completed a Mental Residual Functional Capacity Assessment dated
18 September 14, 2001 that identified "moderate" limitations in
19 working in proximity to others without distraction and "marked"
20 limitations in "the ability to complete a normal workday and
21 workweek without interruptions from psychologically based symptoms
22 and to perform at a consistent pace without an unreasonable number
23 and length of rest periods." AR 248.

24 On March 5, 2003, plaintiff saw consultative psychologist
25 Ubaldo Sanchez, PhD, for a comprehensive evaluation. AR 336-40.
26 Dr Sanchez's report did not mention an interpreter. It noted
27 further that plaintiff "speaks English with an accent" and "did not
28 have any difficulty with complex instructions and repetition and

1 emphasis were not needed." AR 336. It also noted that plaintiff
2 "did not demonstrate any physical impairment, and no distinguishing
3 motor characteristics were noted" and, regarding plaintiff's report
4 of "feeling depressed," it quoted plaintiff as saying the medicine
5 for depression prescribed by her doctor had made her feel "much
6 better." It also noted "She does not see a mental health
7 professional. 'It's a Russian thing. We never go to a
8 psychologist.'" AR 338.

9 Dr Sanchez conducted several tests: the Bender Visual
10 Motor Gestalt Test, Reyes 15 Items Memory Test, Wechsler Adult
11 Intelligence Scale - III and Wechsler Memory Scale - III.
12 Plaintiff obtained a full-scale IQ score of 80, placing her at the
13 "lower limits of the low average range of measured intelligence."
14 AR 338. The report noted, however, that "[h]er verbal scores [from
15 her measured intelligence tests] must be viewed with caution given
16 the cultural bias of the test." AR 340. On the memory sub-tests,
17 plaintiff scored in the lowest one percentile in auditory,
18 immediate and working memory, and in the lowest fifth percentile in
19 visual memory, indicating "a decline in memory skills." Id. Dr
20 Sanchez diagnosed plaintiff with major depressive disorder and a
21 GAF of 53. AR 339. He listed "unemployed" among "psycho-social
22 stressors." Id. Dr Sanchez concluded that plaintiff would benefit
23 from mental health treatment and that she "is not limited to daily
24 activities such as dressing, bathing and eating, * * * would not
25 have any difficulty being socially appropriate, * * * [is] able to
26 perform mildly complex tasks [and] * * * to handle funds," but
27 would have "mild to moderate difficulty concentrating, focusing and
28 keeping up with the pace of a working environment." AR 340.

On the basis of Dr Sanchez's report, agency physician Craig A Smith, MD completed a Psychiatric Review Technique form in April 2003 marking only the boxes for "affective disorders" and "impairments not severe." AR 387. On June 23, 2003, agency physician George P Norbeck, MD affirmed this conclusion. Id.

On April 11, 2003, the SSA denied plaintiff's second application for SSI benefits. AR 78. After her request for reconsideration proved fruitless, AR 83, plaintiff requested a hearing before an ALJ. AR 87. She also secured counsel to represent her. AR 90. On October 30, 2003, plaintiff's attorney, Mr Terry LaPorte, sent a letter to the ALJ amending plaintiff's alleged disability onset date to the date of her initial application — March 6, 2001. AR 176. In this letter, plaintiff requested the reopening of her March 6, 2001 application pursuant to the provisions of 20 CFR § 1588-89. Id.

1 across the street without taking a break to rest. AR 43.
2 Plaintiff further testified that she began taking classes to learn
3 English in 1997, and that for the three years preceding her 2003
4 hearing, she attended English classes three days a week for about
5 three hours, AR 38, and that her progress in learning English was
6 hindered by her medical impairments, especially by her memory
7 problems. AR 49.

8 The VE testified that based on the exhibit file,
9 plaintiff's past job in Russia fell into the light exertional
10 category, but that plaintiff's inconsistent testimony at the
11 hearing that her job had required lifting as much as thirty pounds
12 suggested a medium exertional level. AR 58. The VE opined that
13 there would be "no transferable skills to sedentary employment
14 [but] [t]here would be transferable skills to light exertionally."
15 AR 59. Plaintiff's attorney then questioned the VE about various
16 hypothetical non-exertional (i e, mental health) restrictions drawn
17 from various mental health evaluations in the reports, such as
18 "mild to moderate difficulties in concentrating, focusing and
19 keeping up with the pace of a working environment," "marked
20 restriction in the ability to withstand the stress of a routine
21 workday" and "marked restriction in the ability to maintain
22 emotional stability * * * caused by depression." AR 60-62. The VE
23 testified that with only "mild" non-exertional restrictions,
24 plaintiff could transfer her skills to other light work, but that
25 "moderate" restrictions would hamper her ability to maintain
26 employment. AR 60-62.

27 On February 14, 2003, the ALJ issued a decision finding
28 that plaintiff did not meet the criteria for disability. The ALJ

1 began by denying the request to re-open plaintiff's 2001
2 application, stating that, because more than one year had elapsed
3 following the initial determination of the prior claim, "that claim
4 does not require reopening for 'any reason,'" AR 16, and no good
5 cause to reopen the prior determination existed. Id.

6 To determine whether plaintiff was entitled to benefits,
7 the ALJ conducted the five-step sequential evaluation of
8 plaintiff's claim of disability as set forth at 20 CFR §
9 404.1520(b)-(f), which considered: (1) whether plaintiff was
10 currently engaged in "substantial gainful activity"; (2) whether
11 plaintiff had a "severe" impairment or combination of impairments;
12 (3) if plaintiff had a severe impairment, whether plaintiff had a
13 condition which met or equaled the conditions outlined in the
14 Listing of Impairments, 20 CFR Pt 404, Subpt P, App 1 as well as
15 the duration requirement; (4) if plaintiff did not have such a
16 condition, whether plaintiff was capable of performing her past
17 work; and if not, (5) whether plaintiff had the residual functional
18 capacity to perform any other work which existed in substantial
19 numbers in the national economy.

20 At the first step, the ALJ found that the claimant had
21 not engaged in substantial gainful activity since the amended
22 alleged onset of disability. AR 21.

23 At the second step, he found that plaintiff had two
24 medically determinable impairments — a mild adjustment disorder
25 and mild arthritis — and that these qualified as "severe." AR 21.
26 Concerning plaintiff's reported depression, the ALJ adopted the
27 specific findings of consultative psychologist Dr Sanchez that
28 plaintiff "would not have significant limitations in her activities

1 of daily living or social functioning, and would have only 'mild to
2 moderate' limitations in her ability to maintain concentration and
3 keep up with the pace of a working environment." AR 19. "Because
4 there is no evidence that the claimant ever felt the necessity to
5 pursue psychiatric or psychological care of any kind, and because
6 this medical opinion is significantly more restrictive than others
7 in the file," the ALJ accorded less weight to the opinion of Dr
8 Tobias who opined, in 2001, that plaintiff "would have 'marked'
9 limitations in withstanding the stress of a routine workday and in
10 maintaining emotional stability and predictability." Id.

11 At step three, the ALJ found that while the medical evidence
12 supported a finding that plaintiff had mild arthritis, this
13 impairment did not singly or in combination with plaintiff's non-
14 exertional limitations, "meet or medically equal * * * one of the
15 impairments listed in Appendix 1, Subpart P Regulations [No] 4."
16 AR 18, 22. Because there was no evidence that plaintiff received
17 or was then receiving any more than basic medical treatment, the
18 ALJ based his conclusions on the consultative evaluations and state
19 agency physicians who had previously reviewed the complete,
20 objective medical evidence. AR 19. Regarding the asserted mental
21 health restrictions, the ALJ wrote:

22 Neither consultative mental health evaluator in
23 the record opined that the claimant would be
24 incapable of returning to her past relevant work
25 due to her alleged mental health impairments. In
26 fact, as emphasized previously, the claimant has
pursued no mental health treatment or even
referrals, other than those required by the State
Agency, secondary to her SSI claims.

27 AR 20. The ALJ rejected Dr Tobias's opinion that plaintiff would
28 have "marked" limitations in managing work stress and emotional

1 stability as "inconsistent with the medical records" and with the
2 opinions of the other evaluators and because plaintiff had not
3 pursued mental health treatment. Id.

4 The ALJ also discounted plaintiff's subjective complaints
5 as "not fully credible when compared to the record as whole,"
6 noting specifically plaintiff's admitted capacity to spend her days
7 cooking, cleaning, studying English and "helping out around the
8 house," the uncontradicted evidence that her depression was
9 effectively controlled with Zoloft and her failure to pursue mental
10 health treatment. AR 22. The ALJ commented on the conflicting
11 dates alleged for onset of disability, including one that alleged
12 severe pain and depression during a period when she also claimed to
13 be involved in an intensive English study program. AR 20.

14 At step four, the ALJ concluded that "the claimant's past
15 relevant work as a sheet metal instructor did not require the
16 performance of work-related activities precluded by her residual
17 functional capacity (20 CFR § 416.965)," and that her "medically
18 determinable mild adjustment disorder and mild arthritis [did] not
19 prevent [her] from performing her past relevant work." AR 22.
20 This conclusion was based on the ALJ's finding, based on the
21 reports in the record, that plaintiff could lift and carry up to
22 twenty pounds occasionally and ten pounds frequently, sit up to six
23 hours and stand and walk for up to six hours in an eight-hour
24 workday. Id. Accordingly, he found that she could "perform a
25 significant range of light work." AR 18, 22. Here, the ALJ also
26 noted that, according to the VE, claimant could return to her past
27 relevant work as a sheet metal instructor "as it is customarily
28 performed in the United States general economy." AR 21. Having

1 reached this conclusion at step four, the ALJ did not proceed to
2 step five.

3 In conclusion, the ALJ held that the claimant was "not
4 under a 'disability' as defined in the Social Security Act, at any
5 time through the date of the decision (20 CFR § 416.920(e))" and
6 was therefore ineligible for SSI payments under Sections 1602 and
7 1614(a)(3)(A) of the Act. AR 22.

8 Plaintiff appealed to the SSA's Appeals Council, which
9 denied review, rendering the ALJ's decision final. AR 7-11. On
10 April 30, 2004, plaintiff timely filed the instant action seeking
11 judicial review.

12 II

13 Under 42 USC § 405(g), a decision to deny benefits may be
14 overturned if the decision is not supported by substantial evidence
15 or if the decision is based on legal error. Thomas v Barnhart, 278
16 F3d 947, 954 (9th Cir 2002). Substantial evidence means more than
17 a scintilla but less than a preponderance. Id. Substantial
18 evidence is relevant evidence which, considering the record as a
19 whole, a reasonable person might accept as adequate to support a
20 conclusion. Id. Where the evidence is susceptible to more than
21 one interpretation, one of which supports the ALJ's decision, the
22 ALJ's conclusion must be upheld. Id.

23 III

24 A

25 "Disabled" is defined as "unable to do any substantial
26 gainful activity by reason of any medically determinable physical
27
28

1 or mental impairment which can be expected to result in death or
2 which has lasted or can be expected to last for a continuous period
3 of not less than 12 months." 20 CFR § 416.927.

4 Conditions meeting the criteria set forth in the "Listing
5 of Impairments" are presumed disabling, without any specific
6 finding as to the claimant's ability to perform his past relevant
7 work or any other jobs. Lester v Chater, 81 F3d 821, 828 (9th Cir
8 1995); 20 CFR § 416.920(d). A claimant is deemed disabled if her
9 condition either "meets" or "equals" a listed impairment. Id. To
10 "meet" any of the listed mental impairments, the SSA must find that
11 diagnostic criteria in paragraph A of the impairment definition
12 (for example emotional lability and impairment in impulse control
13 or medically documented persistence of a short term memory
14 impairment) are met, as well as that a specified number of
15 functional restrictions in paragraph B (for example, marked
16 restriction of activities of daily living and marked difficulties
17 in maintaining concentration, persistence or pace) are met. Id.
18 The purpose of the functional criteria in paragraph B is to measure
19 the severity of the claimant's impairment. 20 CFR Part 404,
20 subpart P, App 1 § 12.00(C).

21 Even if a claimant's mental impairment does not meet the
22 criteria specified in the listings, however, she must be found
23 disabled if "the combination of [her] impairments is medically
24 equal to any listed impairment." Lester, 81 F3d at 829; 20 CFR §
25 416.926(a). As relevant here, the claimant's illnesses "must be
26 considered in combination and must not be fragmentized in
27 evaluating their effects." Lester, 81 F3d at 829, citing Beecher v
28 Heckler, 756 F2d 693, 694-95 (9th Cir 1985). In addition, where a

claimant alleges mental impairments, the ALJ is required to use the "special technique" set forth in 20 CFR § 416.920a(a) for evaluating the severity of mental impairments.

In her appeal, plaintiff alleges that she is disabled and unable to work due to osteoarthritis and a history of major depression. AR 407. Plaintiff makes two challenges to the decision: (1) she asserts that he failed to consider her exertional and non-exertional limitations in combination and (2) she contends that he improperly failed to account for plaintiff's lack of facility in English. Pl Mot (Doc #6) at 5.

First, the court addresses plaintiff's assertion that the ALJ improperly failed to consider the combination of plaintiff's exertional and non-exertional limitations. The ALJ found that plaintiff "has a mild adjustment disorder and mild arthritis, impairments that are 'severe' within the meaning of the Regulations but not 'severe' enough to meet or medically equal, either singly or in combination to one of the impairments listed in Appendix 1,

1 Subpart P, Regulations No 4." AR 18.

2 The ALJ properly relied on Dr Chiang's report finding
3 plaintiff free of significant physical limitations as on the
4 unequivocal conclusions of agency physicians that plaintiff was not
5 disabled by her arthritis.

6 Similarly, the three SSA-ordered mental health
7 evaluations were reviewed and considered by the state agency
8 physicians who concluded that plaintiff was able to perform light
9 work. AR 391. The ALJ, relying on these reports, addressed the
10 degree of limitation in each of the four functional areas specified
11 in § 404.1520a. AR 19-20. The ALJ gave cogent reasons for
12 according less weight to Dr Tobias's more restrictive findings,
13 which he found to be at odds with the other medical evidence and
14 with plaintiff's failure to seek treatment. Id.

15 Plaintiff also contends that the ALJ should not have
16 discredited her alleged mental impairments based on her failure to
17 pursue mental health treatment given the asserted scarcity of
18 mental health services for primarily Russian-speaking individuals
19 without health insurance in the Santa Clara County area. AR 408.
20 It was reasonable, however, for the ALJ to give weight to the fact
21 that "the claimant has pursued no mental health treatment or even
22 referrals, other than those required by the State Agency, secondary
23 to her SSI claims," AR 20, and that plaintiff's depression had
24 been so completely controlled by Zoloft that she discontinued this
25 medication for six months. AR 21.

26 The ALJ's finding that plaintiff's impairments did not,
27 in combination, meet or equal a listed impairment is supported by
28 substantial evidence in the record and must therefore be upheld.

Plaintiff's second claim — that the ALJ improperly failed at step four of the sequential analysis to consider plaintiff's inability to speak English in evaluating her ability to perform her past relevant work — is also without merit. Plaintiff contends that her inability to communicate in English made her unable to perform her past relevant work and therefore amounts to a disability. Id at 6.

The governing section of the Act is 42 USC § 1382c(a)(3)(B), which provides:

an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

In Social Security Ruling 82-40, the SSA set forth guidance as to how to approach the fourth step to determine "whether the individual can do his or her previous work, whether in the United States or in a foreign economy," when the prior work experience is in a foreign economy:

The relevance of past work in a foreign economy for purposes of regulations sections 404.1520(e) and 416.920(e) is no different from the relevance of past work in the United States economy with respect to the physical and mental demands of the particular past job. If a claimant can meet the sitting, standing, walking, lifting, manipulative, intellectual, emotional and other physical and mental requirements of a past job, he or she is still functionally capable of performing that job regardless of the fact that the individual no longer resides in the country where the past work was performed. It is only after a claimant proves

1 that he or she is not able to do his or her
2 previous work that the burden shifts to the
3 Secretary to show that there is work available in
4 the United States national economy which the
 claimant can do (the fifth and last step of the
 sequential evaluation process).

5 The stated purpose of SSR 82-40 was to address problems arising from
6 the view that "past work performed in a foreign economy" was only
7 relevant to the fourth step if substantially similar work was found
8 in the United States economy by making clear that vocational factors
9 such as education, should not be considered at the fourth step of
10 the sequential analysis. See 20 CFR §§ 404.1560(b), 416.960(b).
11 Instead, whether similar work can be found in the United States
12 economy is an inquiry properly reserved for the fifth step of the
13 sequential analysis.

14 The Ninth Circuit has specifically upheld SSR 82-40 as
15 consistent with the Social Security Act and its implementing
16 regulation(s). Quang Van Han v Bowen, 882 F2d 1453, 1457 (9th Cir
17 1989). In Quang, a claimant whose occupational history consisted
18 solely of working in an herbal medicine store in Vietnam challenged
19 SSR 82-40 as inconsistent with 42 USC § 1382c(a)(3)(B), which
20 defines "disability" in part as the inability to "engage in any
21 other kind of substantial gainful work which exists in the national
22 economy." The court held that the Secretary's interpretation of §
23 1382c(a)(3)(B) — that "although the Act requires 'other' work to
24 exist in the United States, it places no such limitation on
25 'previous' work" — was one of at least two reasonable
26 interpretations of the statute and not inconsistent with the Act or
27 its implementing regulations. *Id* at 1457. The court explained the
28 justification for SSR 82-40 thusly:

Each of the steps asks the ultimate question, whether the claimant is healthy enough to be employable, in terms that approximate the statute with increasing precision. If the claimant is in sufficient physical and mental condition to perform [her] previous work, [her] impairment is clearly not so severe as to preclude employment. This should hold true no matter where [her] previous work took place * * *.

Id.

While Quang did not directly address plaintiff's central contention in this appeal — the ability to speak English as a factor in determining disability — its holding, when combined with other relevant sources of law, plainly bars consideration of a claimant's inability to communicate in English when evaluating claimant's ability to perform previous relevant work. In Garcia v Secretary of Health & Human Servs, 46 F3d 552 (6th Cir 1995), the Sixth Circuit rejected a claimant's challenge to the SSA's determination that he retained the RFC to perform his past relevant work despite his "virtual inability to communicate in English." The court analyzed the text of the statute and found that Congress intended to exclude vocational factors from step four of the sequential analysis:

This intent is borne out by the structure of the disability definition. The phrase "considering his age, education, and work experience" interrupts and therefore exclusively modifies the phrase "but cannot * * * engage in any other kind of substantial gainful work which exists in the national economy." Accordingly, the phrase "considering his age, education, and work experience" does not modify the phrase "not only unable to do his previous work." The inevitable reading is that Congress intended a claimant's ability to perform previous work to be assessed apart from the considerations of age, education, and work experience."

Id at 555-56 (citations omitted). In Garcia, the Sixth Circuit expressed accord with the Ninth Circuit's opinion in Quang,

1 explaining that "Congress manifested the intention [to distinguish
2 sharply between unemployment compensation and the disability
3 benefits provided by the Act] by defining 'disability' under the
4 Act as a predominantly medical determination, as opposed to a
5 vocational one." Id at 558-59. Accord Bussi v Barnhart, 87 Soc Sec
6 Rep Serv 605, 2003 US Dist LEXIS 9278 at *20, 2003 WL 21283448
7 (SDNY 2003) (claimant's inability to speak English held irrelevant
8 to determination of whether she can perform her past relevant
9 work); Martinez v Bowen, 685 F Supp 70, 71 (SDNY 1988) (remand for
10 consideration of impact of plaintiff's inability to speak English
11 on his ability to perform past relevant work held inappropriate,
12 citing Social Security Ruling 82-40).

13 The ability to communicate in English is considered as
14 part of the rule governing education as a vocational factor, 20 CFR
15 § 416.964(b)(5). The regulation acknowledges that the inability to
16 speak English is a handicap:

17 Because English is the dominant language of the
18 country, it may be difficult for someone who doesn't
19 speak and understand English to do a job, regardless
20 of the amount of education the person may have in
another language. Therefore, we consider a person's
ability to communicate in English when we evaluate
what work, if any, he or she can do.

21 Id. If, however, the SSA determines at step four that the claimant
22 can still perform her past relevant work, "we will find that you
23 are not disabled," and will not proceed to step five, at which
24 vocational factors are considered. 20 CFR § 416.920(a)(4)(iv).
25 If, and only if, the ALJ had reached the fifth step under the
26 sequential analysis would it have been appropriate to evaluate
27 educational factors such as plaintiff's ability to speak English,
28 but his analysis concluded at step four.

